UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ANTHONY F. CAMPAGNA,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-398-P-H***
	)	
BATH IRON WORKS CORPORATION, et al.,	***)***	
	)	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTIONS TO DISMISS

This action is one of two lawsuits now pending in this court involving allegations that defendants Bath Iron Works Corporation ("BIW") and Fortis Benefits Insurance Corporation ("Fortis") violated the Americans with Disabilities Act ("ADA") in connection with certain disability benefits provided to the plaintiff, a BIW employee who has rapidly cycling bipolar disorder. In *EEOC v. Bath Iron Works Corp., et al.* (Docket No. 97-355-P-H), the Equal Employment Opportunity Commission ("EEOC") alleges that BIW and Fortis violated the rights secured to the plaintiff under Title I of the ADA, which concerns employment discrimination. The plaintiff has brought the instant action individually, invoking Title I of the ADA as well as Title III of the statute, governing public accommodations, and the provisions of the Maine Human Rights Act that are analogous to the ADA.

The defendants have each moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the plaintiff's claim under Title I of the ADA (Docket Nos. 2-3). Their position is that the plaintiff's exclusive pathway to legal redress under Title I is to intervene in the separate action filed by the EEOC, and that the Title I claim is subject to dismissal because the EEOC has not issued a "right

to sue" letter to the plaintiff as required by the ADA. I recommend that the defendants' motion be granted.

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.,* 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez,* 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

Title I of the ADA concerns discrimination against "a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The "powers, remedies, and procedures" available for the enforcement of the employment discrimination provisions are those set out in Title VII of the Civil Rights Act. 42 U.S.C. § 12117(a) (referring to Title VII provisions condified as 42 U.S.C. §§ 2000e-4 to 2000e-6 and 2000e-8 to 2000e-9). The provisions governing when an individual plaintiff may bring an action individually to redress unlawful employment discrimination appear at 42 U.S.C. § 2000e-5(f). They provide, in relevant part:

> If within thirty days after a charge is filed with the [EEOC]. . . , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . . named in the charge. . . . If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . , the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be

aggrieved . . . .

42 U.S.C. § 2000e-5(f)(1).

In this instance, the complaint avers that the plaintiff duly filed a discrimination charge with the EEOC, which then instituted the civil proceedings in Docket No. 97-355-P-H. Complaint (Docket No. 1) at ¶ 24. The defendants take the position that the EEOC's decision to pursue a civil action, rather than to issue the defendant a right-to-sue letter under section 2000e-5(f), means that the plaintiff has failed to satisfy the statutory prerequisite to maintaining an action under Title I of the ADA in his own name.

Construing section 2000e-5(f), the First Circuit has noted that the receipt of a right-to-sue letter from the EEOC is a precondition to the filing of a suit by an individual plaintiff. *See McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 504, 505 (1st Cir. 1996) (pointing out that the requirement is not jurisdictional and, thus, subject to waiver, estoppel and equitable tolling). Conceding that no right-to-sue letter has been issued by the EEOC, the plaintiff takes the position that the requirement should be waived in this case. He reports that he first filed a charge of discrimination with the EEOC in 1993, filed an amended charge in April 1996, and thereafter requested a right-to-sue letter on four separate occasions between April and November 1997, to no avail. This scenario certainly supports an inference that the plaintiff did all he might reasonably be expected to do in order to protect his rights under Title I of the ADA, and that the EEOC should not have kept the plaintiff waiting for as long as it did for a decision on how the agency intended to proceed. However, given that the EEOC ultimately opted to litigate the plaintiff's case, and given

that the plaintiff is exercising his right to intervene in the EEOC-initiated proceeding,[1] what is lacking is any indication of what harm has accrued to the plaintiff in these circumstances so as to justify the court's use of its equity powers to contravene the process outlined in section 20000e-5(f)(1). *See Rice v. New England College*, 676 F.2d 9, 10-11 (1st Cir. 1982) (refusing to waive requirements of section 2000e-5(f)(1) absent a "recognized equitable consideration").

To support his contention that he should be permitted to proceed with an individual complaint under Title I of the ADA independently of the EEOC, the plaintiff relies on *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980), and *Riddle v. Cerro Wire & Cable Group, Inc.* 902 F.2d 918 (11th Cir. 1990). As the plaintiff points out, the Supreme Court noted in *General Telephone* that the right of the EEOC to litigate discrimination cases directly "was intended to supplement, not replace, the private action." *General Telephone*, 446 U.S. at 326. This is but one underpinning of the holding in *General Telephone* that the EEOC may use its litigation powers under section 2000e-5(f) to seek specific relief for a group of individuals without first obtaining class certification under Fed. R. Civ. P. 23. *Id*. at 333-34. In *Riddle*, the EEOC had litigated a discrimination claim directly, resolved the claim by entering into a consent agreement with the employer-defendant, and then issued a right-to-sue letter to the employee-plaintiff. *Riddle*, 902 F.2d at 919. Relying in part on the Supreme Court's discussion in *General Telephone* of the non-identical interests of the EEOC and a private plaintiff in vindicating a discrimination claim, the Eleventh Circuit concluded that neither section 2000e-5(f) nor principles of res judicata precluded the plaintiff

[1] Concurrent with the issuance of this recommended decision, I am granting the plaintiff's motion to intervene in Docket No. 97-355 and to consolidate the two proceedings. Such consolidation is subject to the court's ruling on the recommendation to dismiss the plaintiff's ADA Title I claim.

from maintaining a private discrimination claim. *Id*. at 920-923. I agree with the plaintiff that these authorities amply illustrate that his interests are not identical with those of the EEOC. This begs the question of why the plaintiff's interests are not more than amply served in the circumstances through his intervention in the EEOC claim.

For the foregoing reasons, I recommend that the defendant's motion to dismiss the plaintiff's claim under Title I of the ADA (Count I) be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of April, 1998.

_____

David M. Cohen
United States Magistrate Judge